UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-375-60-9339
Issued to: David Keith MALCOLM

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2142

David Keith MALCOLM

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 4 October 1977, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, after hearing held on 22 July 1977 at Detroit, Michigan, suspended Appellant's seaman's documents for three months plus three months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a tankerman on board HANNAH 2902 under authority of the document above captioned, on or about 18 July 1977, Appellant did, "while said barge was transferring Bunker C at Mistersky Power Plant, Detroit, Michigan, wrongfully absent himself from said barge while transferring."

At the hearing, Appellant did not appear.

The Investigating Officer introduced in evidence certain documents and the testimony of three witnesses.

There was no defense.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all documents issued to Appellant for a period of three months plus three months on twelve months' probation.

The entire decision was served on 7 October 1977. Appeal was timely filed and perfected on 16 December 1977.

FINDINGS OF FACT

(Because of the condition of the record, no findings of fact are appropriate in this case.)

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

(1) Appellant was denied a proper hearing by short notice and refusal to delay proceedings;

(2) the specification was fatally defective in light of the applicable regulation;

(3) the charge was altered without proper notice or opportunity for hearing; and

(4) the principal findings are not supported by evidence.

APPEARANCE: School, Theut, Robinson, Stieg & Schilling, Detroit, Michigan, by Marlin F. School, Esq.

OPINION

I

There is some merit to all of Appellant'S points, each of which, however, would not necessarily, if accepted, have dictated reversal. The errors here varied in nature and, under some circumstances, could have proved harmless. It is necessary to consider the points both singly and cumulatively.

II

The hearing was held in absentia. While Appellant complains that service of the charges on 18 July 1977 for hearing at 0900 on 22 July 1977 afforded him insufficient notice, there is here absolutely no fault to be found. It is not urged that at the time of service Appellant indicated an inconvenience or even a preference for some other schedule. I mention this not because such an expression of desire would have necessitated a different program but to emphasize that the notice as to time was not only legally sufficient but was accepted as such without question by Appellant himself. Further, it is absolutely correct that on failure of a person charged to appear on notice the proper course is to proceed expeditiously to hearing and conclusion of the action with a decision. There need be no undue consideration for one who refuses his opportunity to be heard.

There may be conditions apparent, nevertheless, that may make a different course a proper exercise of discretion to preclude an appearance of intemperate haste.

When Appellant failed to appear on notice it was eminently

proper to have opened the proceeding and undertaken the presentation of the case on the record. It is true that the Investigating Officer had, before the substantive proceedings were undertaken, ascertained that Appellant was at work and had not been heard from at his home "since yesterday." Later, but still before the hearing was "underway" at about 0950, it was placed on the record that Appellant's tug had just arrived at St. Clair and that if he intended to appear it would be two hours before he could reach the place of hearing. To this point, there was no cause to have entertained the thought of needlessly delaying the hearing. However, during the examination of the first of the three witnesses called, the record reflects that a communication was received from Appellant's employer that, unaware of the proceeding which involved not only Appellant but two other persons whom the Investigating Officer had duly summoned as witnesses, both of whom were similarly employed, he had dispatched his tug to a point "in Canada" and that all three would be available for appearance at 1400. The time of this advice may reliably be put at about 1015. The Administrative Law Judge declared that the hearing would not be postponed until 1400 and instructed that the caller be advised of his "position." The hearing on the record ended at 1100.

All the persons who testified were attached to the Coast Guard office in Detroit. Two witnesses desired by the Investigating Officer (and the event establishes in retrospect their desirability) were in the same position as Appellant. Decision was not issued for more that two months after closing of the record. Speed was obviously not of the essence. There was a abuse of discretion in the decision to proceed without a relatively minor delay.

There is no need to speculate on details of a readily apparent explanation of what had occurred, but the fault was compounded, as pointed out by Appellant, by the Investigating Officer's reference to Appellant's "default" as indicating a lack of responsibility such as to influence judgment in the case.

III

Appellant also has cause to complain of the allegations of the specification which were, at least in part, subject to misconceptions in the course of the hearing itself.

There is no reference in the specification to a regulatory standard as measure of the conduct alleged to have been wrongful, and it is not necessary that there should have been. It would be enough that a standard, regulatory, statutory, or even customary, existed. It is plain however that there is nothing in the concept of "tankerman", merely as such, to require that a "tankerman" be

aboard a barge on which he serves at all times during a transfer operation.

Appellant has directed his attention to a regulation which, he interprets, requires only presence "in the immediate vicinity" and being "immediately available." He urges that mere "absence" does not imply "not being in the immediate vicinity." If this were the sole fault, the error could well have been cured by evidence, except that Appellant was not present to litigate on the notice found available in Kuhn v. CAB, CA, D.C., 183 F.2d 839. Possibly overlooked also is that the specification does not allege that Appellant was a "person in charge." This error is also one which would be subject to cure had litigation under the "Kuhn" doctrine occurred, but, of course, it did not.

The matter does not end there, or that simply.

Not only does Appellant refer to a regulation as controlling here, but the Administrative Law Judge cites as the applicable standard the regulation at 33 CFR 156.160 (c). This reads, in a section captioned "Supervision by person in charge":

> "No person may transfer oil to or from a vessel unless the person in charge is in the immediate vicinity of the transfer operation and immediately available to the oil transfer personnel."

It must first be noted here that the term "person in charge" has two possible applications in this statement. In paragraph (a) of the cited section the term is associated with both the person qualified under section 154.710 and designated by "facility operator" under that section as "person in charge of facility oil transfer operations," and a person designated by an operator or agent of one of a class of vessel as "person...in charge of each transfer of oil to or from the vessel...." It is seen that before paragraph 156.160(b) can be violated two persons, at least, must be, by way of proof, positively excluded from the immediate vicinity of the transfer, the "vessel" person in charge and the "shoreside man" or "shoreside attendant" (as the facility person in charge is called on the record of this case). Worth noting here is that two of the witnesses who testified (although the evidence was not used as a predicate for a finding of fact by the Administrative Law Judge) agreed that the "shoreside attendant" was present on the scene.

Further, this paragraph is directed not to a "person in charge" but to all other persons. It does not order that the person in charge remain in the "immediate vicinity" during transfer operations; it merely commands others not to transfer if there is

no person in charge present. It follows also, aside from the fact that the order is not directed to a person in charge, that the paragraph does not even indirectly set a standard of conduct for a person in charge such that "absence" even from the "immediate vicinity" is wrongful, since the transfer may properly begin or continue, under this paragraph, if only one of the persons in charge is immediately available to the transfer personnel.

Even if the allegation had been that Appellant was a "person in charge" a theory of inattention to duty based solely on a perceived violation of 33 CFR 156.160(b) would fall.

The possibility of developing some other theory of fault need not be explored here, since no other theory was even hinted at in the notice of hearings or even in the course of the in absentia proceedings held.

IV

As to the altercation of the charge without notice this is, in fact, the least of the errors accumulated except for the manner of its accomplishment. "Inattention to Duty" and "Misconduct" undoubtedly share between them an area of action which may properly be chargeable under either caption. If the conduct is in fact of this nature it would not be fatal that a change have been made even in an in absentia proceeding since the initial notice would have reasonably encompassed the matter under either caption. By the same token, however, if the case is such that a redesignation of the charge could be justified there would obviously have been no need for it.

What happened here, however, is that the question of the "charge" was raised by the Administrative Law Judge. After the Investigating Officer had explained his rationale for electing one over the other as a single theory for proceeding, the Administrative Law Judge on his own motion made the alteration. This action placed the impartial trier of facts in the position of prosecutor, and, taken along with several preemptive examinations of witness, puts the proceeding in an unfavorable light.

It may also be noted here that the initial decision carries the statement that the Administrative Law Judge had announced in open hearing "his finding that the specification had been proved by plea." Since there is reflected in the record the fact that a plea of "not guilty" had been entered in accordance with the prescribed procedure it would appear that this may have been an inadvertent slip of the pen. The transcript, however, records this as being his action on the record:

> "Going back on the record, I would, first of all, note that the charge, in my opinion, should have been misconduct rather than inattention to duty. And having said that, I am finding that the charge of misconduct has been proved, the specification has been proved, and proved by me."

(Emphasis supplied.)

To save this from appearance of acknowledgment of having undertaken prosecutional functions I am willing to accept that this is one of several minor errors in the transcript, but the only imaginable alternative is that what was said was "proved by plea." Once again, this could be offset by recognition of the fact that a proper plea was entered, but the suspicion remains that the nature of the in absentia proceeding was basically misunderstood.

Before evidence was introduced, the Administrative Law Judge advised the Investigating Officer, in knowledge that Appellant had not appeared, "your opening statement should include the testimony you would have and the evidence you would have introduced had you been required to prove your case. In other words, you can state what you would have proven if you had been required to, if the respondent were here." At another point, still before the presentation of any evidence, the Administrative Law Judge, having been advised that witnesses were awaiting call, declared, "Since they are here, it would be desirable to have their testimony in the record...." Later, with respect to the two witnesses who were under subpoena but had not appeared, the Administrative Law Judge directed that the Investigating Officer state what they would have testified to had they appeared.

All this bespeaks a belief that despite the entry of the required plea of "not guilty" the failure of appearance on notice is equivalent to a complete default and "confession of judgment." This conception must be repudiated even if, in fact, the record could otherwise have been found to meet the requirements for proof.

V

While any one of these flaws in proceeding might have been explainable or curable if found isolated in an otherwise adequate record, the truth is also that the evidence actually presented has too many deficiencies to support the basic allegation as understood.

Apart from the encouragement to one witness to spread blatant hearsay on the record, which cannot but help to cumulate otherwise weak evidence, the fact is that:

(1) there was no identification of the person charged by any witness at all; and

(2) there was no identification of the person charged as the "person in charge" of the transfer operation.

There was evidence that someone pointed out to one witness another person as "the tankerman." A leading question by the Investigating Officer invited the witness to declare that the person so pointed out was "the respondent."

There was evidence that the person pointed out to the above mentioned witness as "the tankerman" also talked with another witness. This other witness, without further identification, was allowed to refer to the person to whom he spoke as "the respondent."

There was evidence that the name of respondent appeared as signature on a "declaration of inspection" form as "tankerman" and "person in charge delivering unit." Two other persons also signed as "person in charge receiving unit." There is evidence also that "the shoreside man" was present on the scene in full view of the transfer operation. There is no evidence that Appellant was in charge of the "transfer operation," only an assumption that he was that which he was not even alleged to have been in the notice of hearing.

Other defects mar the presentation of the case. The name of the towboat involved is not mentioned in the specification, nor need it have been, but there is discussion to the effect that the towboat aboard which Appellant worked was named "BARBARA ANN." The document introduced to connect Appellant with the case identified as one of the "vessels" involved in the transfer: "Tug MARGARET ANN," which the Investigating Officer termed, without more, a "mistake." When the Investigating Officer's first witness testified about the matter he referred to the fact that he boarded the tug MARGARET ANN, but he was persuaded by the Investigating Officer to change the name to BARBARA ANN, of which name he was then certain. At the same time, there is a reference in the record to a tug named "BARBARA ANN" as one on which Appellant's father was employed and another to the tug "MARGARET" on which Appellant was employed.

Further, stress was placed in the initial decision on the fact that Appellant "appeared to have been swimming" and reference was made there to "his conduct in willfully leaving his post to swim." The predicate for these statements is evidence that Appellant "was

putting on his hiking boots, and he was wet." The witness qualified this by saying:

> "My conclusion was that he had been swimming, but that's what it appeared to me. Of course, that's only conjecture."

With the inevitable conclusion from the evidence that Appellant was "dressed" to some extent (it was not stated that he was naked except for the boots), even though "he was wet," and from the possible existence of showers aboard a towboat or other possible sources of a dousing with cooling water, it is a rash inference from another's mere conjecture to hold that a "willful" "swimming" took Appellant off the barge where there was no categorical duty to be.

Confusion like this cannot be considered fact finding on substantial evidence.

CONCLUSION

I conclude that the charges were not proved by substantial evidence.

ORDER

The order of the Administrative Law Judge dated at Boston, Massachusetts, on 4 October 1977, is VACATED, the findings made are SET ASIDE and the charges are DISMISSED.

R.H.SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D.C., this 9TH of NOVEMBER 1978.

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